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Div. of Oil, Gas & Mining

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

Living Rivers,

Petitioner,

vs.

Division of Oil, Gas and Mining,

Respondent,

Red Leaf Resources, Inc.,

Respondent-Intervenor

**PETITIONER'S RESPONSE TO THE
DIVISION'S REPLY TO PREHEARING
BRIEFS AND MOTIONS**

Docket No. 2012-017

Cause No. M/047/0103

Living Rivers submits this Response to the Reply to Pre-Hearing Briefs and Motions (Reply) filed by the Division of Oil, Gas and Mining (Division) on June 20, 2012. The Division has indicated that it does not object to the filing of this Response.

I. The Board Should Deny The Division's Motion for Summary Decision.

The Division's arguments go beyond the scope of the arguments raised in Red Leaf's Motion. Red Leaf's Motion sought only "partial" summary judgment on the narrow claim that "the Division did not have authority to condition final approval of Red Leaf's Notice of Intention

to Commence Large Mining Operations for the Southwest No. 1 Project (“NOI/LMO”) upon the approval of a groundwater discharge permit by the Utah Division of Water Quality.”

Memorandum In Support of Red Leaf’s Motion for Partial Summary Decision at 1. Red Leaf’s Motion asks the Board to determine as a matter of law that the *timing* of the separate permitting decisions by the Division and DWQ, standing alone, does not violate the Utah Mined Land Reclamation Act, Utah Code Ann. §§ 40-8-1 *et seq.*

By contrast, the Division argues more broadly that Petitioner failed to establish *any* basis for relief and specific facts demonstrating the Division erred in conditioning approval of the NOI on receipt of a groundwater permit from DWQ. Reply at 2. Although the Division’s Reply states that “partial” summary decision is warranted, the pleading itself appears to advocate for full summary judgment on the merits of Petitioner’s challenge.

To the extent that the Division is now seeking a summary decision that goes beyond that requested by Red Leaf, the Division has failed to comply with the requirements of Rule 7 of the Utah Rules of Civil Procedure. Utah R. Civil P. 56(c) expressly states that a summary judgment “motion, memoranda and affidavits shall be in accordance with Rule 7” of the Rules. According to Utah R. Civ. P. 7(c)(3)(A), “[a] memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials.” Red Leaf’s Motion complies with this Rule by including eight numbered paragraphs identified as “Statement of Undisputed Material Facts.” Memorandum at 2. By contrast, the Division’s Motion does not comply with the Rule.

According to Red Leaf, these sparse facts are simply “the basic facts relating to the timing of the two permits.” *Id.* at 7. As Petitioner pointed out in its Response to Red Leaf’s Motion, the fact that the dates that certain events occurred are undisputed is not sufficient to form the basis for any decision, partial or otherwise. According to UAPA, the Board may only grant a motion for summary judgment “if the requirements of Rule 56 of the Utah Rules of Civil Procedure are met by the moving party.” Utah Code Ann. § 63G-4-102(4)(b). The Division’s attempted joinder contains no similar statement of undisputed material facts, and for this reason the Board should reject any attempt by the Division to expand the scope of Red Leaf’s Motion.

The Division claims that Petitioner’s Request for Agency Action and Pre-Hearing Brief do not identify any law the Division violated. To the contrary, Petitioner’s challenge is based, in part, on the proposition that the Division’s action violated UAPA. According to UAPA, an agency action may be set aside as unlawful if:

- (1) “the agency has erroneously interpreted or applied the law”;
- (2) “the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedures”;
- (3) “the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence”;
- (4) “the agency action is ... contrary to a rule of the agency” or “contrary to the agency’s prior practice” unless the agency demonstrates a fair and rational basis for the inconsistency;
- (5) the agency action is ... “otherwise arbitrary or capricious”; or,
- (6) the Board determines that the Executive Secretary’s decision suffers from any of the other deficiencies listed in UAPA.

Utah Code Ann. § 63G-4-403(4); *see* Petitioner’s Pre-Hearing Brief at 5.

In addition, Living Rivers has consistently maintained that the Division’s action approving the NOI failed to meet the minimum requirements of the Utah Mined Land

Reclamation Act and its implementing regulations. Specifically, Living Rivers has argued that the Division's Act violated the following specific provisions of law:

- * Utah Code Ann. § 40-8-12. "The objectives of mined land reclamation are:
 - (1) to return the land, concurrently with mining or within a reasonable amount of time thereafter, to a stable ecological condition compatible with past, present, and probable future local land uses;
 - (2) to minimize or prevent present and future on-site or off-site environmental degradation caused by mining operations to the ecologic and hydrologic regimes and to meet other pertinent state and federal regulations regarding air and water quality standards and health and safety criteria; and
 - (3) to minimize or prevent future hazards to public safety and welfare."
- * Utah Code Ann. § 40-8-12.5: "Every operator shall be obligated to conduct reclamation and shall be responsible for the costs and expenses thereof."
- * Utah Code Ann. § 40-8-13(1)(d): "The notice of intention for mining operations, other than small mining operations, shall include a plan for reclamation of the lands affected as required by rules promulgated by the board."
- * Utah Code Ann. § 40-8-22:
 - "(1) The division shall cooperate with other state agencies, local governmental bodies, agencies of the federal government, and appropriate private interest in the furtherance of the purposes of this act.
 - (2) The division is authorized to enter into cooperative agreements with these agencies, as may be approved by the board, in furtherance of the purposes of this act and may accept or commit funds in connection thereto as may be appropriated or otherwise provided for the purpose and as specifically approved by the board, except that such actions shall not result in any delegation of powers, responsibility, or authority conferred upon the board or division by this act."
- * Utah Admin. Code R647-4-106: "The operator shall provide a narrative description referencing maps or drawings as necessary, of the proposed operations including:
 - (2) Type of operations to be conducted, including the mining/processing methods to be used on-site, and the identification of any deleterious or acid forming materials present or to be left on the site as a result of mining or mineral processing;

(8) Depth to groundwater, extent of overburden material and geologic setting;”

- * Utah Admin. Code R647-4-109: “The operator shall provide a general narrative description identifying potential surface and/or subsurface impacts. This description will include, at a minimum:
 - (1) Projected impacts to surface and groundwater systems;
 - (4) Projected impacts of mining operations on slope stability, erosion control, air quality, and public health and safety;
 - (5) Actions which are proposed to mitigate any of the above referenced impacts.”
- * Utah Admin. Code R647-4-110: “Each notice of intention shall include a reclamation plan, including maps or drawings as necessary, consisting of a narrative description of the proposed reclamation including, but not limited to:
 - (4) A description of the treatment, location and disposition of any deleterious or acid-forming materials generated and left on-site, including a map showing the location of such materials upon the completion of reclamation;”
- * Utah Admin. Code R647-4-111: “During reclamation, the operator shall conform to the following practices unless the Division grants a variance in writing:
 - (4) Deleterious Materials - All deleterious or potentially deleterious material shall be safely removed from the site or left in an isolated or neutralized condition such that adverse environmental effects are eliminated or controlled.
 - (5) Land Use - The operator shall leave the on-site area in a condition which is capable of supporting the postmining land use.”

Notably, Living Rivers does not maintain that the Division has violated the operator notification requirements contained in Utah Code Ann. § 40-8-13(6). *See* Division’s Reply at 3-4 & 6.

As discussed in detail in its Pre-Hearing Brief, Petitioner does not dispute that the Division has the authority to impose conditions upon approval of an NOI so long as such conditions do not violate the law. Relying upon *Utah Dep’t of Transportation v. ROA General, Inc.*, the Division argues that “[c]onditional approval was reasonable because Utah Courts have held that administrative agencies have inherent authority to identify an existing requirement of

law and make it a condition to granting a permit of license.” Division’s Reply at 5. In *ROA General*, the Court found that it was proper for the Utah Department of Transportation (UDOT) to condition an outdoor advertising permit on the applicant’s subsequent demonstration of access to the property. 927 P.2d 666, 667–68 (Utah Ct. App. 1996). However, the *ROA General* court did *not* allow UDOT to impose a condition that would violate its governing statutes or regulations or Utah law. After invalidating the condition’s requirement that access be obtained within 90 days, the *ROA General* court held that “an agency may not take actions in conflict with the design of an Act, and when they do the court has a duty to invalidate them” and that “when an administrative official misconstrues a statute and issues a regulation beyond the scope of a statute, it is in excess of administrative authority granted.” *Id.* (internal alterations and quotations omitted). Therefore, *ROA General* supports Petitioner’s claim that the Division cannot delegate to DWQ by conditioning its approval action on Red Leaf’s Ground Water Discharge Permit Application because such a delegation violates the clear statutory language in Utah Code Ann. § 40-8-22(2) (noting that the Division can enter into “cooperative agreements” with other agencies, but “that such actions shall not result in any delegation of powers, responsibility, or authority conferred upon the board or division by this act”).

The Division relies upon *National Park Conservation Ass’n v. Board of Trustees of School and Institutional Trust Lands (NPCA)*, 2010 UT 13, for the proposition that “summary judgment is appropriate because [Living Rivers] has failed to demonstrate specific facts that they were substantially prejudiced by the Division’s actions.” Division’s Reply at 5. However, the Division’s reliance on *NPCA* is misplaced for two reasons. First, *NPCA* did not involve an appeal from a summary judgment ruling. Living Rivers does not need to prove that it has been “substantially prejudiced” in order to defeat the Division’s Motion. As noted in Petitioner’s

Pre-Hearing Brief, the *relevant* question is whether there are material issues of fact in dispute, not whether Living Rivers was substantially prejudiced by the Division's decision to "conditionally approve" Red Leaf's mining operations. Second, the *NPCA* court clearly limited the scope of its ruling by holding that the articulated standard of review applied only to "final action of the *SITLA Board* in a formal adjudicative proceeding." *Id.* at 1197 (emphasis supplied). The *NPCA* opinion addresses a different type of proceeding before a different agency and therefore the decision is not relevant to the case at hand.

Nonetheless, Petitioner has been substantially prejudiced by the Division's failure to comply with the provisions of UAPA and the Utah Mined Land Reclamation Act detailed above. The Division's decision to approve Red Leaf's NOI (a) without taking appropriate action to ensure that the NOI was complete and accurate, (b) without assigning personnel with the appropriate knowledge and expertise to review the capsule design; (c) without considering substantial evidence in the record indicating that Red Leaf's claims regarding depth to groundwater and potential impacts to groundwater was unjustified; and (d) without establishing a reasonable reclamation bond that takes into account the possibility of failure of the capsules and resulting harm to the environment, was arbitrary and capricious and represents a clear error of law pursuant to UAPA and the Utah Mined Land Reclamation Act.

The Utah Supreme Court has held that "summary judgment is a drastic remedy and should be granted with reluctance." *Housley v. Anaconda Co.*, 427 P.2d 390, 393 (Utah 1967). The "purpose [of summary judgment] is to eliminate the time, trouble and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail." *Holbrook Co. v. Adams*, 542 P.2d 191, 193 (Utah 1975). A grant of partial summary judgment here would not eliminate any time, trouble or expense at the hearing scheduled for next

week. Living Rivers has raised good faith factual and legal objections to the process followed by the Division in approving Red Leaf's NOI. The specific facts supporting Petitioner's challenge in this case are described in detail in Petitioner's Pre-Hearing Brief and Expert Reports, and Petitioner's Memorandum in Opposition to Red Leaf's Motion for Partial Summary Decision describes controverted facts consistent with the requirements of Utah R. Civ. P. 56(c) and 7(c)(3)(b). Petitioner's challenge is also supported by admissions made by the Division in its Pre-Hearing Brief, which were detailed in Petitioner's Response to the Division's Pre-Hearing Brief. For all of the reasons stated above, the Board should disregard and deny the Division's purported attempt to support Red Leaf's Motion and allow this matter to proceed to hearing without partial or summary decision or other limitation.

II. The Board Should Deny the Division's Motion in Limine.

The Division's Reply indicates "support" for Red Leaf's Motion in Limine with respect to proposed testimony by James Kuipers relating to (a) the economic stability of Red Leaf; (b) adequacy of the reclamation bonding; and (c) opinions based on the BLM's 2012 Oil Shale and Tar Sands Draft Programmatic Environmental Impact Statement. Division Reply at 7. Living Rivers addressed Red Leaf's arguments with respect to these matters in its Response to the Motion in Limine filed on June 20, 2012, and will not repeat those arguments here.

The Division claims that Mr. Kuipers should not be allowed to testify about the adequacy of the reclamation bond due to "prejudice" to the other parties. However, Living Rivers' Request for Agency Action did indicate that the Division's approval of the NOI violated provisions of the Utah Mined Land Reclamation Act regarding reclamation. In addition, Mr. Kuipers' expert report – which details the basis for Petitioner's claim that the bond amount is insufficient – was provided to the other parties on May 25, 2012. Therefore, the Division and

Red Leaf have had ample time – at least one month – to develop facts and arguments in response to these contentions.

III. The Board Should Adopt the Standard of Review Set Forth in Petitioner's Pre-Hearing Brief.

Living Rivers continues to contend that the standard of review should be governed by decisions of the Utah appellate courts interpreting UAPA. Petitioner's position is set forth at pages 4-7 of its Pre-Hearing Brief and those arguments will not be repeated here.

For the foregoing reasons, Living Rivers respectfully requests that this Board DENY the relief requested in the Division's Reply. Living Rivers further requests that this Board provide such other relief as may be appropriate.

Respectfully submitted this 22nd day of June, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 2012, I served a true and correct copy of the foregoing Response to the Division's Reply to Pre-Hearing Briefs and Motions by Petitioner Living Rivers by email and via first-class mail to Julie Ann Carter, Secretary to the Board of Oil, Gas and Mining as follows:

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